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IN THE

Supreme Court of the United States

No. 992—October Term, 1941

LAZZARO LAGUERRA,

Plaintiff-Respondent,

—against—

LLOYD BRASILEIRO,

Defendant-Petitioner.

BRIEF OF PLAINTIFF-RESPONDENT

ABRAHAM S. ROBINSON,
Counsel for Respondent.

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Statement.

This action, to recover damages for personal injuries sustained by plaintiff, was instituted in the District Court by reason of diversity of citizenship. Plaintiff's claim of negligence is that defendant failed to provide a safe place to work, in that a bulkhead in hatch 4 was so negligently and dangerously constructed by defendant's agents, as to constitute a menace to persons working therein (Comp., pars. 1, 2, 8; ff. 8, 9, 11).*

The cause was tried in the United States District Court, Eastern District of New York, before Hon. Marcus B. Campbell and a jury, on April 28, 29 and 30, 1941. At the conclusion of plaintiff's case, the complaint was dismissed. Plaintiff then moved for a new trial, which motion was denied (Order, 40-42), following an opinion (43-63; reported 39 Fed Supp 668).

* All references, unless otherwise indicated, are to folios.

On appeal, the Circuit Court of Appeals, Second Circuit, unanimously reversed the judgment and remanded the cause for a new trial (Opinion, pp. 202-206; reported 124 F. 2d 553). Defendant now seeks a writ of certiorari.

The Issue Presented.

The sole question presented to the Circuit Court was whether plaintiff proved facts sufficient to make out a *prima facie* case, determinable by a jury, as to defendant's negligence and plaintiff's freedom from contributory negligence.

The question now presented is whether the Circuit Court decision is in conflict with the decisions of any other Circuit.

Respondent contends that:

1. Plaintiff proved facts sufficient to make out a *prima facie* case determinable by a jury.

2. The Circuit Court decision is not new or novel, nor is it in conflict with the decisions of any other Circuit.

Facts.

Plaintiff was employed by a stevedoring company, which in turn was engaged in removing cargo from defendant's ship, "Cantuaria", at Pier 14, North River, New York (68). Plaintiff was one of eight holdmen assigned to hatch 4 (69), containing a cargo of bags of coffee of about 135 pounds each, destined for New York (71) and bags of cocoa, of about 225 pounds each, consigned to Philadelphia (72).

The cargo in hatch 4 was stowed in South America by an agency of defendant (579), under supervision of the chief officer and pier superintendent of defendant (585-589).

When the entire cargo in a hatch is not consigned to the same port, it is customary to construct a bulkhead between

the cargo to be removed and that portion to remain (242). Sometimes such a bulkhead is constructed of wood or metal placed as a wall between the cargoes. At other times, as in the case at bar, portions of the cargo itself are used to construct a bulkhead. The purpose of the bulkhead is to guard against the falling of cargo remaining after a portion is discharged.

The accepted method of constructing a bulkhead is to tier the bags in interlocking layers, alternately "a-burton" and fore and aft (84-85; 240-243; 341-342; 408-410).

Plaintiff's gang commenced to unload by starting in the center of the New York cargo and working toward the four corners (73). After discharging New York cargo for about an hour, the top portion of the bulkhead first became visible (75). It was then noted that the bulkhead was improperly constructed. At the bottom the bags were properly bulk-headed, alternately "a-burton", fore and aft and interlocked. The top piers of the bulkhead were all stowed "a-burton" (76).

At that time the men noticed that some of the bags in the top section of the bulkhead were canting forward (87). This fact was called to the attention of the stevedore foreman, who directed the men to remove that portion which was canting (88, 92). After removing about 50 bags of Philadelphia cargo, the men were directed to resume discharge of New York cargo (94). There still remained several tiers of the bulkhead stowed improperly, all "a-burton" (121).

Plaintiff, not yet satisfied that enough Philadelphia bags had been removed, said so to the stevedore foreman. The latter said it was "O. K.", and that the men "could see it was O. K." Plaintiff wanted "to be sure" (198-200), and the foreman asked a sailor (assigned to aid as needed) to go out and get some rope to lash the Philadelphia cargo (253). About 15 or 20 minutes later, and before the sailor had

returned, some of the top bags of the bulkhead fell and struck plaintiff, causing the injuries upon which this action is predicated (255).

POINT I.

Plaintiff's proof was sufficient *prima facie* to raise a question of fact as to defendant's negligence.

The condition of the bulkhead was the same when erected in South America as when the vessel arrived in New York. The improper construction existed, was dangerous and constituted a menace from the time of its erection until the accident.

There is a primary, positive and absolute duty imposed by law upon a master to provide a safe place to work. This duty is a continuing one and the employee may assume that the master has performed it (*Kreigh* v. *Westinghouse*, 214 U. S. 249).

It is the duty of shipowners to furnish stevedores or other independent contractors and their employees a reasonably safe place to work.

The Adour, 21 F 2d, 858, 861;
The Rheola, 19 Fed 926;
Pioneer SS. Co. v. *McCann*, 170 Fed 873;
Gerrity v. *The Kate Cann*, 2 Fed 241, aff'd 8 Fed 719.

Shipowners must exercise care to keep the premises reasonably secure against danger and are liable for injuries resulting to workmen by reason of failure to exercise care to provide reasonably safe places in which to work.

The Joshua W. Rhodes, 259 Fed 604;
The Colon, 249 Fed 460;
The Isthmian, 201 Fed 572.

The bulkhead between the Philadelphia and New York cargoes having been erected solely for the purpose of preventing the fall of Philadelphia cargo when and after the New York cargo was discharged, plaintiff could rightfully rely on the shipowner's performing the duty of erecting a safe bulkhead and could assume that the bulkhead was erected in accordance with competent and usual practices.

The statement contained in the opinion of the District Court, that "the shipowner turned the ship over to an independent contractor in a safe condition for the purpose of discharging her cargo destined for New York * * *" (51) is not in accord with the proof. The ship was not in a safe condition for the purpose of discharging the New York cargo.

The bulkhead being improperly constructed and inherently dangerous, there was always imminent danger that when the New York cargo was removed, the Philadelphia cargo would fall. Thus the shipowner did not turn over the ship to the independent contractor (plaintiff's employer) in a safe condition, particularly for the purpose of discharging the New York portion of the cargo in hatch 4.

A cursory reading of the District Court's opinion (53), would lead to the conclusion that the only reason the bulkhead fell was that the New York cargo was removed. It is true, that in point of time, the bulkhead did not fall until the removal of a portion of New York cargo. However, that was not the reason for the falling of the bulkhead. Had the bulkhead been properly erected, the work of removing the New York cargo would have proceeded with safety. The bulkhead was there to effect just such purpose.

The Supreme Court stated in *Hayes* v. *Michigan Cen. R. R.*, 111 U. S. 228, 241:

> "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the

sense of an efficient cause, *causa causans,* this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non;* a cause which, if it had not existed, the injury would not have taken place, an occasional cause, and that is a question of fact, unless the causal connection is evidently not proximate (citing cases)."

At bar, nothing that was done after the original loading in any way changed either the construction or the danger. If a shipowner is responsible for improper construction and danger which results, then nothing done later by the stevedores can absolve the owner's negligent acts.

When this shipowner directed the stevedores to remove only New York cargo, it impliedly warranted that the cargo to remain (Philadelphia) was properly stowed and bulkheaded and would not fall. It cannot be gainsaid that the Philadelphia cargo fell as a result of the bulkhead being improperly erected. The removal of New York cargo was neither the direct nor the proximate cause of the fall of the bulkhead.

Plaintiff submits that when the owner delivered the ship to the contracting stevedores and directed them to remove the New York cargo from hatch 4, that hatch was not in a safe condition and the stevedore employees, including plaintiff, were not given a reasonably safe place wherein to work.

The master of the vessel testified that the loading was done by an agency of defendant under direct supervision of the ship's chief officer (584, 586-587). In addition, a sailor is assigned to each hatch, whose duties in part are to place "the proper things in the proper places". The superintendent of the pier is the one who indicates the place where the different cargoes go (574).

Defendant shipowner is therefore chargeable with the knowledge that the bulkhead was improperly constructed. The ship's officers, in supervising the loading, were chargeable with the duty of seeing that the bulkhead was properly constructed. Their negligence in this regard is directly attributable to the defendant, their employer.

In *Kunschman* v. *U. S. S. B.*, 54 F. 2d 987, the Court said (p. 989):

> "The primary duty was on the shipowner to provide a safe engine in the fulfillment of its obligation to the deceased to furnish safe appliances with which to work. Panama R. R. v. Johnson, 264 U. S. 375. And the statute allows recovery for negligence in this regard. Howarth v. U. S. S. B., 24 F. 2d 375, although such owner is not an insurer. Burton v. Greig, 271 F. 271. When it undertakes to fulfill this duty by means of an independent contractor, but nevertheless keeps such control over the work that it has or is charged with, the same knowledge of defects it would have had if it had done the work itself and one of its employees who is furnished the appliances with which to work is injured because of a defect due to negligent construction, the proximate cause of the injury is not the negligence of the independent contractor, but that of the shipowner. Under such circumstances, the owner cannot escape responsibility for the negligence because in law it is its own. Caspersen v. LaSala Bros., 253 N. Y. 491; Hooey v. Airport Cons. Co., 253 N. Y. 486."

The ship's officers and defendant's employees knew to which ports the different portions of cargo were destined. They knew that the cargo in hatch 4 was to go to different ports, and that it would be necessary to remove a portion at New York and leave the remainder on board. The very

construction of the bulkhead indicates that the ship's officers were aware that the entire cargo in hatch 4 was not to be discharged at the same time and place. Having knowledge of these facts, it was their duty to so supervise the loading that removing a portion would not leave the remainder in danger of falling. This failure to properly supervise in itself would constitute negligence.

Plaintiff's claim is based solely on the improper construction of the bulkhead. He contends that liability may be predicated on any negligent act of a shipowner, irrespective of the condition of the ship's appliances.

This is not a novel theory of law, but rather one long recognized. Many cases have charged a shipowner with liability for negligent acts such as improper stowage having nothing to do with defects in the structure of the ship or its appliances.

As Judge Brown stated in *The Frank & Willy,* 45 Fed 494, 496:

> "The principle involved, viz, the duty to provide reasonable security against danger to life and limb by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers, is manifestly a general one. It attends the seaman wherever he is required to go, on shipboard, in the performance of his duties, *and applies as much to a dangerous condition of the cargo as to defective rigging or a rotten spar.*" (Italics ours.)

In that case, libelant, while unloading, had his leg broken through the fall of lumber piled in tiers and not fastened by ties. After a space was cleared down to the floor over the keel, the lumber stood about seven feet high, the tiers became shaky and the pile fell. The Court, in awarding him a verdict, said (p. 496):

> "Employers are required to provide workmen with reasonably safe conditions for work, according to the nature of the business and to the customary provisions for the safety of life and limb."

In *Leathers* v. *Blessing*, 105 U. S. 626, the facts as given in the opinion are: The SS. Natchez had arrived with a cargo of cotton bales for discharge. A portion was negligently stowed on the forward deck several tiers high and the passageway was covered with cotton bales piled on the bridging. While on board going through the passageway, a bale of cotton fell and struck libelant. The Supreme Court affirmed the award although the injury was caused solely by improper stowage of cargo and no other claim of negligence was raised.

In *McGrath* v. *Penna. Sugar Co.*, 282 Penn. 265, 127 Atl. 780, plaintiff, a stevedore employed by an independent contractor, while engaged in removing a stack of bags of sugar, was struck and injured by the fall of some of the bags. One of plaintiff's claims of negligence was that the bags were piled without proper binders. This claim was upheld, the Court stating (p. 782):

> "The claim of the plaintiff was based on *negligence in piling the sugar without proper binders*, as a result of which a stack of bags fell, and also in ordering McGrath to move from a safe to a dangerous place, where he was injured. The court instructed the jury if it found there was *proof of lack of due care in either respect*, causing the accident, no contributory negligence appearing, *a recovery could be had. In this we see no error.*" (Italics ours.)

In *Buckley* v. *Cunard SS. Co.*, 233 App. Div. 361, a nonsuit was reversed and a new trial granted, upon the following facts:

Plaintiff, a stevedore, was engaged in loading a vessel. The vessel was first loaded with cotton bales, which were floored off and piled in tiers. Because of the irregular shape of the bales, there was created an uneven surface upon which the men were required to work. Just previous to the accident the men were directed to stop loading cotton and begin loading copper ingots. Plaintiff was injured while assisting in receiving the first draft of ingots, which he and his gang were trying to push aft. As they reached the edge of the hole, the left end of the draft caught on a protruding cotton bale, plaintiff's hand was caught between the chain of the draft and one of the ingots, and his left thumb was torn off. The Court stated (p. 364):

> "We are of opinion that in the circumstances disclosed it may not be said as a matter of law that the defendant had discharged its full duty to the plaintiff. What constituted a safe place to work in loading the cotton bales would not necessarily make safe the place in which the copper ingots were to be loaded. There was a decided change in the nature of the plaintiff's work, and it was for the jury to say whether the defendant was not required to apprehend the danger arising out of the new situation and to have provided a smooth flooring surface upon which the work might be performed."

In *Gerrity* v. *Bark Kate Cann*, 2 Fed 241, aff'd 8 Fed 719, libelant was between decks, trimming a cargo of grain. Above him a quantity of dunnage and plank had been stowed behind two braces forming a sort of rack. While seated nearly under this dunnage, the braces gave way and the whole mass fell upon him. It appeared that that morning two heavy planks were placed in the rack which subsequently fell. After discussing the facts, the Court stated (p. 245):

"If then it appears in this case that there was a duty owing to the libelant in respect to the manner of stowing the dunnage and the plank that fell upon him * * *, the right of the libelant to require that the ship be held to be charged with the damages caused to him by the omission of that duty, must be upheld. * * *

"So far as the character of the structure affects the question of liability, this case seems to be within the principle of the case of *Thomas* v. *Winchester*, 6 N. Y. 397; for in this case, as in that, the death or great bodily harm of someone was the natural and almost inevitable consequence of the structure as it was at the time it fell. Such being the character of this structure, in case the mass was not properly secured, if the libelant was in the between decks of this ship in the exercise of a right to be there, the shipowner owed him a duty to see that the dunnage and plank were properly secured, which duty was not properly performed."

In *Port of New York Stevedoring Corp.* v. *Castagna*, 280 Fed 618, a stevedore was injured by reason of dunnage being improperly piled in a rack, in that one of the sticks which held up the pile was rotten. When plaintiff grasped the first piece of dunnage, the rotten piece of wood which acted as a support, gave way. The verdict for plaintiff was affirmed.

In *The Thomas Cranage*, 189 Fed 1003, libelant sustained injuries while shoveling grain between decks by the falling upon him of a section of a wooden hatch cover. The testimony indicated that various sections of the hatch cover had been improperly piled by the crew before the unloading began. While the work of unloading was in progress,

a section dropped into the hold and upon libelant. It was not shown what primarily caused the hatch cover to fall. The hatch covers were not fastened together. The Court stated (p. 1005):

> "It was the duty of the respondent to use diligence in providing the libelant with a reasonably safe place to work and * * * I think the situation and circumstances are such that it may fairly be presumed that if the sections had been properly piled and secured, they could not have been irregularly and unevenly placed, either by the crew or the stevedores, nor could they have been displaced by the movement of the boat. *The fact that the section dropped into the hold is persuasive evidence of improper and insecure piling and consequent negligence on the part of respondent.*" (Italics ours.)

In *John Spry Lumber Co.* v. *Duggan*, 54 N. E. 1002, Duggan was one of a group of men on the boat engaged in passing the lumber to yardmen. While going from the boat to the water closet and in passing one of the piles of lumber placed by the yardmen, the pile of lumber fell and injured him. A verdict in his favor was unanimously affirmed. The Court held that a servant of one having a contract with a company to unload its lumber from a vessel, employed merely to pass the lumber over the vessel's rail to defendant's yardmen, who are piling it on defendant's dock, does not assume the danger of a pile's falling, nor does he remain in his employment with knowledge of the danger, when it is conclusively proven that such a danger was not ordinarily incident to the business and that such accident never happened before the servant was injured.

POINT II.

The concurring negligence, if any, of the stevedore does not absolve this defendant.

It is plaintiff's contention that the sole, direct and proximate cause of the accident was the improper tiering of the bulkhead. The fact that during the progress of the work the portion of the bulkhead canting forward was removed, did not make the original dangerous condition any worse, rather, the removal of those bags partially remedied the danger.

It may be argued that the foreman did not use the best judgment when he directed the removal of only those bags actually canting and should have directed the removal of the entire portion of the bulkhead improperly tiered. However, in his judgment a sufficient number of bags to eliminate the immediate danger, had been removed. He also directed the sailor to procure rope to lash the remaining bulkhead.

At best, the judgment of the foreman may have created a question of fact as to whether he (and thereby his employer) concurred in defendant's negligence. If the bulkhead *originally* had been properly constructed, no bags would have canted or fallen, irrespective of whether a portion of the bags were or were not removed. The direct cause of the fall of the Philadelphia bags was the improper stowage. All of the factors which arose during the course of the discharge of New York cargo and prior to the accident, could not of themselves alone have caused the fall of the bags.

Assuming, *arguendo*, that the actions of the foreman constituted negligence, this negligence would be chargeable to his employer, the stevedoring company. It could not in any manner be charged to plaintiff, who was a mere

employee, bound to obey the instructions of his immediate superior, the foreman. Whether plaintiff was contributorily negligent in continuing to work, would at most be a question of fact. If the shipowner was negligent in creating and maintaining the improper bulkhead, it would be liable notwithstanding the concurring negligence of the performers of the work.

The Supreme Court has always refused to absolve a negligent master by reason of concurring negligence:

> "In the instruction which was given, we find no error. It was, in effect, that if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." *Grand Trunk Ry.* v. *Cummings*, 106 U. S. 700, 702.
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> "If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff, the master would be liable, notwithstanding, the concurring negligence of those performing the work." *Kreigh* v. *Westinghouse*, 214 U. S. 249, 257.
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> "But aside from the statute, it is very disputable if the instructions were correct. It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master has been held to be liable (citing cases)." *Deserant* v. *Cerillos Coal Co.*, 178 U. S. 409, 420.
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> * * * * *

"Defendant contends that there can be no recovery because the foreman of the stevedores was negligent in directing or permitting the plaintiffs to step on the tarpaulin. The answer to this argument is that the doctrine of assumption of risk of injury resulting from the negligence of a fellow servant can be invoked as a defense only when the action is against a common master. Morgan v. Smith, 159 Mass. 570; Reagan v. Casey, 160 Mass. 374. * * *" *Ford* v. *Allan Line,* 116 N. E. 505, 227 Mass. 109.

Assuming as we have, that there was negligence of plaintiff's employer which concurred with the negligence of defendant, and assuming further, that the accident would not have occurred solely by reason of the negligence of either without the concurring negligence of the other, plaintiff is still the only person who may select his remedy and *tort feasor.*

POINT III.

Plaintiff was not guilty of contributory negligence as matter of law.

The evidence did not establish plaintiff's contributory negligence *as a matter of law.* Plaintiff does not claim that contributory negligence is not a factor in the case. The *jury,* in its province, *may* have found that plaintiff's acts contributed to the accident, and on this score the *jury* may have decided in defendant's favor.

A trial court may not rule on the issue of contributory negligence unless all the probative facts are undisputed and these undisputed facts are such that all reasonable minds can draw but one inference from them (*Mosheuvel* v. *District of Columbia,* 191 U. S. 247, 252). At bar, neither of these elements is present.

Following is a brief resumé of the facts bearing on this question:

After the holdmen in hatch 4 had removed some tiers of New York cargo, they observed for the first time that the bulkhead was improperly constructed and that the top tiers were canting. They advised the foreman of this fact, and were directed to remove some of the Philadelphia bags comprising the bulkhead. After removing about fifty, the holdmen, including plaintiff, were directed to resume discharging New York cargo.

Plaintiff testified that a danger existed because some of the bags were canting forward (192-193), however, it is important to note that it *was not* one of these canting bags which struck plaintiff (194, 195).

When the holdmen were ordered to stop discharging Philadelphia cargo, the top of the bulkhead, while still improperly stowed (a-burton) was no longer canting forward.

At that point, the holdmen, as plaintiff put it, "to be sure", asked for the removal of the additional portion of the bulkhead which was improperly stowed, however, the foreman, their immediate superior, assured them everything was "O. K." (198-200).

The foreman testified that, at that point, "everything looked all right and everything was O. K. as far as the eye could see", and that "the remaining bags were not leaning forward"; that none of the Philadelphia cargo could be removed by the stevedores without first obtaining the defendant's express permission (247-249; 487).

In addition to this "assurance of safety" and "order to continue work", the foreman immediately asked the only member of the ship's crew present, the sailor Santiago, assigned to that hatch by the captain, to procure rope to lash the remaining Philadelphia cargo for the reason that

"the further down we got, the more dangerous it would be" (253).

The holdmen continued to discharge New York cargo, and about twenty minutes later some of the Philadelphia bags fell and struck plaintiff.

The outstanding fact is that plaintiff is a mere employee of the stevedoring company. He cannot be charged with the concurring negligence of his employer. We must not confuse plaintiff's status with that of his employer. The difference between them is obvious. Plaintiff could not direct the work. His sole choice was to obey his superior's commands or quit work. Nor can he be charged with the errors of his employer, whose acts may have concurred with defendant's in causing the injury.

While it is true, as after events proved, that more Philadelphia cargo should have been removed, we must not overlook the fact that neither the stevedoring company nor plaintiff had the right to remove that cargo without defendant's express permission. Even if such permission had been obtained, it was the foreman and not plaintiff who was in sole command and the only one who could direct what portion of Philadelphia cargo should be removed. The foreman was not a fellow-servant, but rather the representative of the master, and his negligence is not chargeable to plaintiff (*The Remus*, 17 F 2d 948, 9).

No active act of plaintiff contributed to the accident. The only act of plaintiff which could be considered contributory negligence, is his continuing to work under the conditions then and there prevailing. The utmost that defendant can claim is that plaintiff, with knowledge of the conditions, continued to remain in a place of danger.

The best proof that the danger was not so obvious and imminent as to charge contributory negligence as a matter of law, is that the entire gang of eight men in hatch 4 re-

sumed discharge of New York cargo with plaintiff. It certainly cannot be said that as a matter of law the condition was such that no prudent person would continue to work there.

Mere presence and knowledge of danger would not make plaintiff guilty of contributory negligence.

Northern Pacific v. *Mares*, 123 U. S. 710, 720.
Schenkemeyer v. *Tusek*, 210 Fed 151.
Pressed Steel Car v. *Nist*, 176 Fed 919.
Frost v. *McCarthy*, 200 Mass. 445, 448; 86 N. E. 916.
Kambour v. *Boston, etc.*, 77 N. H. 33, 49; 86 Atl. 624.
Sullivan v. *Dunham*, 35 App. Div., 342, aff'd 161 N. Y. 290.
Pierson v. *Gohr*, 126 Md. 385, 94 Atl. 1021.

Even were we to disregard the point that mere presence and appreciation of danger does not constitute contributory negligence as a matter of law, the facts at bar show that plaintiff could properly continue work and not be charged with contributory negligence, for at least four reasons:

A. The danger was not obviously imminent.

Seaboard Air Line v. *Horton*, 239 U. S. 595, 599.
Kreigh v. *Westinghouse*, 214 U. S. 249, 258.

B. Plaintiff was obeying the direct command of his immediate superior.

Carstens Packing Co. v. *Swinney*, 186 U. S. 50, 54.
Pittsburgh, etc., v. *Schaub*, 136 Ky 652, 124 S. W. 885.
Moline Plow Co. v. *Anderson*, 19 Ill. App. 417, 420.
Frandsen v. *Chicago, etc.*, 36 Iowa 372.

C. Plaintiff's immediate superior assured him that the place was safe.

Hayes v. *Sheffield Ice Co.*, 282 Mo. 446, 221 S. W. 705.
Runians v. *Keller & Brady*, 141 Ky 827, 133 S. W. 960.

D. Plaintiff's immediate superior promised to remedy the defect.

Hough v. *Ry. Co.*, 100 U. S. 213, 224.
Seaboard Air Line v. *Horton*, 239 U. S. 595.

POINT IV.

The decision in this case is not in conflict with the rules governing cases of this kind as previously laid down by the Courts of this or any other Circuit.

In petitioner's brief (pages 5, 6; 12, 13), are set forth certain rules which it claims are well established. The cases cited do not establish such rules nor were such rules ever promulgated by any Court in any Circuit.

Petitioner contends there is a well established rule

> "That the vessel owner is liable for injury to a stevedore only where it is caused by a defect in the vessel, her structure or appliances."

The rule is to the contrary. Respondent has shown in Point I of this brief that vessel owners have been held liable for injuries resulting to stevedores and others for any negligence, even where the negligence claimed was not a defect in the vessel, her structure or appliances.

The petitioner likewise asserts an alleged rule

> "that the duty of the vessel owners in the stowage of cargo is with reference to the safe carriage of the cargo and the stability and trim of the vessel. It is not referable to the safety of professional stevedores and their professional employees engaged to discharge the cargo at the end of the voyage."

There is no such rule nor do any of the cases cited by petitioner lay down such rule.

Petitioner further claims that the Circuit Court decision in this case places a new burden on shipowners with reference to stowage of cargo. It is interesting to note that of the seventeen cases cited by petitioner, only the Beechdene (121 Fed 593), and the Belos (1939 A. M. C. 324) have anything to do with the stowage of cargo. All the others relate to other types of negligence. With the exception of the Beechdene case, none of the cases cited by petitioner are even applicable to the issue presented; nor are the facts in any of the cases at all comparable to those at bar.

The bulkhead was improperly constructed prior to the time the ship was turned over to the stevedores for discharge. Petitioner overlooks the fact that the bulkhead which fell and the bags which struck plaintiff were not part of the cargo under discharge. The converse is true. The stevedores were distinctly directed not to remove any Philadelphia cargo, part of which was this improperly constructed bulkhead.

The Circuit Court held that, upon plaintiff's proof, a jury could find that the defendant did not provide the plaintiff a safe place to work.

> "It seems clear to us that a jury could find the bulkhead improperly constructed. Since the ship's agents stowed the cargo, and since it is reasonably foresee-

able that improper stowage might result in bags falling over and striking someone, the ship would be liable for this accident if the jury found it resulted from improper stowage. Cf. The Adour, D. C. Md., 21 F. 2d 858, 861" (p. 204).

The facts showed, and the Circuit Court found, that the defect which existed was present prior to the time the stevedores boarded the ship, and that circumstance immediately eliminates the cases cited by petitioner.

The cases, *Bettis* v. *Frederick Leyland & Co.,* 153 Fed 571; *Bryant* v. *Vestland,* 52 F. 2d 1078; *Luckenbach S. S. Co.* v. *Buzynski,* 19 F. 2d 871; *Navigazione Alta Italia* v. *Vale,* 221 Fed 413; The *Prince Rupert City,* 30 Fed Supp 755; *Mercier,* 5 Fed Supp 511; *Weldon* v. *United States, et al.,* 9 Fed Supp 347; The *Hindustan,* 37 F. 2d 932, affd 44 F. 2d 1015; and *Long* v. *Silver Line,* 48 F. 2d 15, were all decided upon the fact that the ship or its appliances were in good condition when the stevedores took over.

Where originally the place of work or the appliances are found to have been in good condition, and it is only subsequently and during the course of the work, that they become unsafe or defective, the Courts have held, and properly so, that without notice of the defect the shipowner is not liable for injuries caused. However, at bar, the stevedores were not afforded a safe place to work at the onset and therefore the rules of law applicable are those cited by respondent under Point I of this brief.

The Beechdene, relied on by the District Court and by petitioner, was an oral District Court decision in 1899. There the sole claim of negligence was the improper stowage of a single bag of cargo, a far cry from the improper stowage of an entire bulkhead as in the instant case. Moreover, the Beechdene, tried without a jury, is a decision on

the facts at the conclusion of the entire case. The basis of the Court's decision was that no negligence had been proven, rather than the sufficiency of the evidence to establish a *prima facie* case.

In The Belos, as the opinion states, "libelant was injured by certain bales of wood pulp, which he and a number of other co-workers were engaged in discharging from the hold of the ship, falling upon him." In that case, "the discharging of the cargo had created this hazard." At bar, the hazardous condition antedated the turning over of the ship to the stevedores for discharge.

The cases, *Kongosan Maru*, 292 Fed 801; *Ove Tysko* v. *Royal Mail*, 81 F. 2d 960; and *The Ellenor*, 39 Fed Supp 576, are not applicable to the case at bar for the reason that in each the Court found as a fact that no negligence was proven against the shipowner.

In *DeLucá* v. *Shepard*, 65 F. 2d 566, 67 F. 2d 437, claimant was operating the very cable claimed to be dry and thus likely to kink. The Court there held that it was decedent's failure to properly operate the winch, "rather than any negligence of the defendant in providing the cable", that "was the cause of his death."

The other two cases cited by petitioner, *Grays Harbor Stevedore Co.* v. *Fountain*, 5 F. 2d 385; and *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, have absolutely no application to the facts in the case at bar as an examination of the decisions will clearly show.

It is respectfully submitted that the present war may continue and can be prosecuted successfully whether or not plaintiff receives a verdict from this defendant. This case has absolutely no application to nor can it conceivably have any bearing on the war emergency.

Both in time of peace and in time of war, there is, and manifestly should be, a duty on every shipowner to pro-

vide workmen, even stevedores, with a safe place to work, and where a shipowner is derelict in that duty, it should and must respond in damages.

CONCLUSION.

The plaintiff in this case proved a *prima facie* case, determinable by a jury as to defendant's negligence and plaintiff's freedom from contributory negligence; concurring negligence of the stevedores' employer is not chargeable to this plaintiff; no new or novel theory of law is imposed nor is any change effected in the measure of the duty of a shipowner to an independent professional stevedore, by reason of the Circuit Court decision in this case; the decision in this case is in conformity with the usual established rules of law and is not in conflict with the decision of any other court in this or any other Circuit. Therefore, a writ of *certiorari* should be denied.

Dated, March 12th, 1942.

Respectfully submitted,

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